

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
Debtor. . Detroit, Michigan
. July 24, 2013
10:02 a.m.
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HEARING RE. MOTION OF DEBTOR, PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE, FOR ENTRY OF AN ORDER CONFIRMING THE PROTECTIONS OF SECTIONS 362, 365 AND 922 OF THE BANKRUPTCY CODE (DOCKET #53) AND MOTION OF DEBTOR, PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE, FOR ENTRY OF AN ORDER EXTENDING THE CHAPTER 9 STAY TO CERTAIN (A) STATE ENTITIES, (B) NON-OFFICER EMPLOYEES AND (C) AGENTS AND REPRESENTATIVES OF THE DEBTOR (DOCKET #56) BEFORE THE HONORABLE STEVEN W. RHODES UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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1 THE COURT: All right. So I will allow 15 minutes
2 for each of the creditors that have filed objections. These
3 are the Michigan Council 25 of AFSCME, Syncora, the UAW
4 together with Creditors Robbie Flowers, Michael Wells, Janet
5 Whitson, Mary Washington, and Bruce Goldman, the Detroit
6 public safety unions, if I can refer them -- refer to them by
7 that, and the General Retirement System of the City of
8 Detroit and the Police and Fire Retirement System of the
9 city. It doesn't matter to me, counsel, the order in which
10 you proceed, so I will leave that to you to work out.

11 MS. LEVINE: I'm going to go with alphabetical.

12 THE COURT: Okay.

13 MS. LEVINE: Good morning, your Honor. Sharon
14 Levine, Lowenstein Sandler, for Michigan Council 25 of the
15 American Federation of State, County, and Municipal Employees
16 or AFSCME, as it's been referred to here today.

17 Your Honor, very briefly, it's clear that your Honor
18 has read all the papers, and we very much appreciate that
19 given the short time frame that we've been before this Court.
20 Bankruptcy Code Section 105 is extraordinary relief,
21 extraordinary in that it's only used to enforce rights that
22 already exist under the Bankruptcy Code, so it's not there to
23 create new rights that don't currently exist under the Code.
24 What we have here in a Chapter 9 case, which is more
25 restrictive than, for example, a Chapter 11 case, is the

1 situation where if, in fact, the state has not properly
2 authorized the Chapter 9 filing, there are rights that don't
3 exist under the Bankruptcy Code. If Chapter 9, as has
4 historically been seen through the unconstitutional finding
5 of predecessors to Chapter 9, is really being used here to
6 avoid state constitutional rights, then Chapter 9 in and of
7 itself is potentially unconstitutional. If not, it has to be
8 construed narrowly in order to read it constitutionally. We
9 would respectfully submit that using 105 to find rights that
10 don't otherwise exist, particularly of a constitutional
11 nature, is an extremely broad use of 105. This isn't a
12 situation where we're saying to the controller or the
13 governor or Mr. Orr, you know, don't respond to discovery
14 requests in a state court action in a foreign jurisdiction
15 because we need your attention here. We're taking away very
16 fundamental constitutional rights.

17 Secondly, your Honor, if, in fact --

18 THE COURT: So your argument about the narrow
19 application of Section 105 in this case is really a result of
20 the fact that it's a Chapter 9.

21 MS. LEVINE: Yes, your Honor.

22 THE COURT: It's not an argument that's based on
23 Section 105, per se.

24 MS. LEVINE: Yes, your Honor. In a Chapter 11
25 you'll have circumstances, for example, where even in the

1 broader case of a Chapter 11, you won't use Article -- you
2 won't use Section 105 to grant a casino license or a liquor
3 license or tell a utility board they can't change rates, but
4 we have an even narrower situation here because we're in
5 Chapter 9.

6 Two, Chapter 9 can't be used if, in fact, the state
7 has not authorized under its constitution and its laws the
8 Chapter 9 filing. The Chapter 9 filing here is arguably
9 flawed because it intends to go after the pensions. If it
10 goes after the pensions, it arguably violates the state
11 constitution and can't be before this Court, so, again, the
12 issue with regard to whether or not we have an appropriate
13 state constitutional flaw -- sorry. The issue with regard to
14 whether or not we have an appropriate filing is necessarily
15 limited by whether or not we have an appropriate state -- we
16 have an inappropriate state constitutional authorization. If
17 we have an inappropriate state constitutional authorization,
18 that is not simply an implementation tool under 105. That
19 is, in essence, a substantive right that's being creative --
20 created under 105 that does not exist in the state court.

21 In addition to that, your Honor, and also
22 importantly, three, individual citizens of the City of
23 Detroit have the absolute right to protect their own
24 constitutional rights. If we say to them they can't go to
25 the state courts that are there for the protection of their

1 constitutional rights in part, then we are -- then we're
2 using 105 again way more broadly than it gets used in the
3 ordinary course as simply an implementation tool. We're
4 creating more substantive rights. And while this Court
5 has --

6 THE COURT: Well, but why isn't the extended stay
7 that the city seeks here simply a procedural mechanism to
8 funnel such challenges to the Bankruptcy Court and,
9 therefore, does not have the effect of denying citizens or
10 other creditors of their rights to have their constitutional
11 claims heard?

12 MS. LEVINE: Your Honor, if this Court is a court of
13 secondary jurisdiction, no disrespect, with -- but if you
14 look at federalism, comity, abstention, and the state courts
15 are the courts of primary jurisdiction, we would respectfully
16 submit that unlike, for example, determining in a Chapter 11
17 case that there's a validly perfected security interest
18 because you've looked at state law and the UCC is properly
19 filed, we have a very fundamental right here that this Court
20 is being asked to address, so what we're saying is instead of
21 going to the court that's primarily responsible, we're going
22 to come into this Court instead, and it's not as if there's
23 delay or uncertainty with regard to the fact that those
24 matters are going to get heard and considered quickly. We
25 already have state court litigation pending, and the state

1 appellate courts are poised and ready to rule, so there's no
2 reason to divest them of that appropriate jurisdiction under
3 concepts of federalism, comity, and abstention and move that
4 here to a court of secondary jurisdiction on those issues.

5 Your Honor, fourth, with regard to the form over
6 substance, the procedural arguments with regard to 105, in
7 certain circumstances where 105 is being used for things like
8 stopping discovery or minimal things like that, that's one
9 set, but the Federal Rules of Civil Procedure are put in
10 place in order to protect parties and provide due process.
11 There can't be a more fundamental situation where you need to
12 enforce those types of rights than when you're dealing with
13 basic fundamental constitutional rights, and we respectfully
14 submit that even though there are circumstances where
15 expediency mandates the use of 105 quickly, this is not one
16 of those circumstances.

17 Your Honor, the breathing spell under 105 -- the
18 breathing spell under the Bankruptcy Code and the use of 105
19 to extend the breathing spell is only appropriate if, in
20 fact, the underlying bankruptcy is an appropriate bankruptcy.
21 The idea that there's a breathing spell to continue what is
22 potentially an unconstitutional or illegal -- not
23 intentionally, no motive or anything, your Honor, but --
24 proceeding is clearly not anything that 105 was designed to
25 implement.

1 Your Honor, we would respectfully submit that these
2 are very, very fundamental rights, and unlike a Chapter 11
3 case where you have a defined benefit plan where if, in fact,
4 it is terminated, there's federal insurance under the PBGC up
5 to \$57,000, or if you have a multi-employer plan, even if an
6 employer withdraws, the beneficiaries themselves are
7 protected, here our members who participate at most are at or
8 below \$19,000 a year. Clearly there's no safety net. These
9 issues are hard issues. The collateral advantage to sending
10 this back to the state court for an appropriate decision is
11 that the conversations which we believe should have been
12 happening more robustly before the filing could happen now.
13 We respectfully -- we thank your Honor for the time, and we
14 appreciate your Honor's consideration.

15 THE COURT: Thank you. Sir.

16 MR. BENNETT: Good morning, your Honor. Ryan
17 Bennett of Kirkland & Ellis on behalf of Syncora Guarantee
18 and Syncora Capital Assurance. Your Honor, as we attempted
19 to describe in our papers, my client insures, in some cases
20 owns certain securities called the certificates of
21 participation, which were taken out in 2006 to fund some of
22 the city's pension liabilities. We also insure a swap --
23 four swaps related to those securities that are tied to the
24 interest rate, the floating interest rate associated with
25 them.

1 THE COURT: Um-hmm.

2 MR. BRENT: However, this is the city's option.

3 This isn't a requirement of law that they indemnify these --

4 THE COURT: Um-hmm.

5 MR. BRENT: -- just as -- my lawsuit is also against
6 various state actors within the State of Michigan, which --
7 but, again, their wanting to extend this to them would
8 prevent me from litigating my claims against the state
9 officials that have already been denied immunity, and it is
10 currently pending. Those portions they've appealed to the
11 Circuit Court. So now that they're trying to extend this
12 stay, now the Sixth Circuit Court of Appeals case of Brent
13 versus Wayne County, et al. will be stayed as well where the
14 different state defendants -- state employees have uphill
15 decision to deny their qualified and absolute immunity.

16 THE COURT: The defendants in your particular suit
17 are both city employees and other defendants are state
18 employees?

19 MR. BRENT: Yes, and there's also state contractors
20 involved in the lawsuit.

21 THE COURT: Contractors also. Thank you, sir.
22 Would anyone else like to be heard?

23 MR. SANDERS: Good morning, your Honor. My name is
24 Herb Sanders, and I represent the plaintiffs in the case of
25 Phillips versus Snyder pending before this Court, Case Number

1 2:13-CV-11370, before Judge Steeh. That is a case that
2 challenges the constitutionality of PA 436. Motions for
3 summary -- for at least one summary disposition or summary
4 judgment argument have been scheduled. As I initially read
5 the request for stay extension motion filed by the city, it
6 appeared that the city was seeking an extension of stay
7 concerning financial matters that were being litigated, but
8 pursuant to the oral presentation of the city's attorney, it
9 concerns me when she has indicated -- and I paraphrase --
10 that she seeks relief concerning any litigation that might
11 interfere with the city's rights as a Chapter 9 debtor. And
12 I would suggest to the Court to the extent that it might be
13 proposed or suggested that the litigation which I have
14 referenced in which the constitutionality of PA 436 is to be
15 determined by another judge in this court interferes with the
16 rights of the city as a Chapter 9 debtor, that that case not
17 be included as part of the stay order that this Court would
18 issue. I believe it's imperative to this community, to this
19 state that those issues be determined and, in fact, should
20 probably be determined before the bankruptcy proceeds, but I
21 would encourage the Court to not give a broad order if any
22 order were to issue that would be inclusive of matters that
23 are not financial matters such as there are other matters
24 that I know that the union, AFSCME, and others are a part of
25 seeking FOIA requests from the city, injunctive relief as it

1 relates to these types of matters, and I would ask the Court
2 to consider not giving such a broad order --

3 THE COURT: Um-hmm.

4 MR. SANDERS: -- that that type of information could
5 not be obtained and we could not have a determination as to
6 the constitutionality of PA 436 by this Court.

7 THE COURT: Um-hmm.

8 MR. SANDERS: Thank you, your Honor.

9 THE COURT: Thank you. Sir, can you just give me
10 your name again, please?

11 MR. SANDERS: Herb Sanders.

12 THE COURT: Mr. Sanders. Thank you, sir.

13 MR. SCHNEIDER: May it please the Court, Matthew
14 Schneider, chief legal counsel to the Attorney General. I'm
15 here on behalf of the State of Michigan. Your Honor, I'm
16 here for a very, very limited purpose. As counsel to the
17 debtor has indicated, they are not seeking to abrogate the
18 exceptions in Section 362(b), and I know that this is a
19 motion regarding Section 362, so our position is is that if
20 the Court is, indeed, inclined to grant the motion regarding
21 the stay, that the Court's order reflect that nothing in the
22 Court -- nothing what the Court is doing will actually
23 abrogate the exceptions afforded under 362(b).

24 THE COURT: Is there a specific exception you're
25 concerned about?